

CONNIE E. TRAYLOR
Claimant

LARRY, ELMER & ALMA LINSCHIED
Respondent

ITT HARTFORD
Insurance Carrier

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After reviewing the preliminary hearing record and considering the brief of the respondent, the Appeals Board finds as follows:

(1) Claimant alleges she suffered a large ventral hernia while performing her regular work activities for the respondent from November 1995 through March 23, 1997, her last day worked. Respondent argues that claimant failed to prove that her hernia had a causal connection to her work and further failed to give timely notice to the respondent of the work-related accident.

Following the preliminary hearing held on September 11, 1997, the Administrative Law Judge granted claimant's request for medical care, payment of medical expenses incurred to date as authorized medical, and reserved claimant's request for temporary total disability compensation until regular hearing.

The Appeals Board finds claimant's hernia was caused by her heavy lifting activities she was required to perform while caring for the elderly couple, Elmer and Alma Linscheid. This conclusion is supported by claimant's testimony that she developed, in her left abdominal area, a lump following an appendicitis operation and removal of a non-related tissue mass in her left abdominal area on November 10, 1995. Claimant testified that the lump increased in size as she performed the heavy lifting activities required at work. Finally, the lump became symptomatic in March 1997.

On March 27, 1997, claimant was seen at the Wesley Women's Care Clinic in Wichita, Kansas, for her annual physical examination. At that time, the nurse who conducted the physical examination found the symptomatic large lump and immediately referred claimant to Timothy Cole, M.D., a surgeon at the Wesley Clinic.

Dr. Cole diagnosed claimant with a large ventral hernia and recommended immediate surgery. On March 31, 1997, claimant's ventral hernia was surgically repaired at the Columbia Wesley Medical Center. At the time claimant was examined at the Wesley Clinic, claimant testified the doctor notified her that the large ventral hernia was caused by claimant's heavy lifting activities at work.

The respondent presented no contradictory testimony on the issue of causation of claimant's large ventral hernia. Respondent only argued that the medical records did not support claimant's testimony. At this juncture of the proceedings, the Appeals Board concludes that the preliminary hearing record supports the conclusion that claimant's heavy lifting activities at work, over the period of time alleged, caused claimant's large ventral hernia.

(2) Claimant was employed by and supervised by Larry Linscheid, the son of the elderly couple, Elmer and Alma Linscheid. Claimant testified that the last day she worked for the respondent was March 23, 1997. She testified she notified Larry Linscheid that her hernia was work related during a conversation that she had with Mr. Linscheid either on April 2 or April 3, 1997. Larry Linscheid also testified at the preliminary hearing and indicated that he called the claimant while she was hospitalized on April 3, 1997, and during that conversation claimant related her hernia to her work activities.

Respondent argues that claimant's claim for compensation benefits is barred because claimant failed to give the respondent notice of the accident within ten days after the accident as required by K.S.A. 44-520. If claimant did notify Mr. Linscheid that her hernia was work related on April 2, 1997, then claimant would have given the respondent notice within ten days after her last day worked of March 23, 1997. However, if claimant notified respondent on April 3, 1997, as testified by Larry Linscheid, then notice would have been received 11 days following claimant's last day worked.

The Appeals Board finds, that even if notice of accident was not given to respondent until the 11th day, the claimant has met the "just cause" exception for not giving notice within 10 days. See K.S.A. 44-520. The Appeals Board concludes that claimant did not know she had a hernia or that the hernia was work related until the doctor diagnosed the hernia on March 27, 1997. The Appeals Board finds the fact claimant did not know she had a hernia and further that such hernia was related to her work, coupled with immediate surgery, establishes just cause for claimant not giving respondent notice of accident until 11 days following her last day worked.

(3) Respondent raised the issue of whether claimant is entitled to temporary total disability compensation. The Administrative Law Judge reserved claimant's request for temporary total disability compensation until regular hearing. The Administrative Law Judge noted that claimant was released to return to work before claimant filed an application for preliminary hearing. K.S.A. 44-534a, as amended, provides that the Administrative Law Judge may order temporary total disability paid for periods prior to the date of filing of the application. However, as referenced by the Administrative Law Judge, K.A.R. 51-3-5a, provides that except in highly unusual circumstances the Administrative Law Judge shall not award compensation prior to the filing date of the application. The Appeals Board finds that the Administrative Law Judge, by deferring a decision on temporary total disability for regular hearing, effectively denied claimant's request.

The Appeals Board concludes that K.S.A. 44-534a, as amended, grants the Administrative Law Judge the authority at a preliminary hearing to grant or deny temporary total disability compensation pending a full hearing on the matter. Therefore, the Appeals Board does not have jurisdiction to review the issue of temporary total disability compensation at this juncture of the proceedings.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore dated September 16, 1997, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
 Richard J. Liby, Wichita, KS
 Bruce E. Moore, Administrative Law Judge
 Philip S. Harness, Director